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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

REMIGIO NIEBLAS,

Defendant and Appellant.

B302488

(Los Angeles County
Super. Ct. No. BA360224)

APPEAL from an order of the Superior Court of
Los Angeles County, Lisa B. Lench, Judge. Affirmed.

Jeralyn Keller, under appointment by the Court of Appeal,
for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief
Assistant Attorney General, Susan Sullivan Pithey, Assistant
Attorney General, Charles S. Lee and Kathy S. Pomerantz,
Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Remigio Nieblas challenges the trial court's denial of his petition under Penal Code section 1170.95¹ for resentencing on his murder conviction. To be eligible for relief under the statute, a defendant must make a prima facie case that he was convicted either under the natural and probable consequences doctrine, or of felony murder in a case in which the defendant either was not a major participant in the felony or did not act with reckless indifference to human life. (See *People v. Galvan* (2020) 52 Cal.App.5th 1134, 1139–1140, review granted Oct. 14, 2020, S264284.) Nieblas contends that the record did not clearly refute his claim that he was convicted of felony murder or under the natural and probable consequences doctrine, and that the court erred by finding that he had failed to make a prima facie case. We disagree and affirm. The jury received no instructions on either natural and probable consequences or felony murder, and Nieblas's conviction therefore could not have been based on either doctrine.

FACTUAL AND PROCEDURAL SUMMARY

In 2012, a jury convicted Nieblas of one count of first degree murder (§ 187, subd. (a)), and found true an allegation that a principal was armed with a firearm in the commission of the murder. (§ 12022, subd. (a)(1).) The jury also convicted Nieblas's codefendant, Robert Padilla, of four counts of extortion. (§ 520.) The court sentenced Nieblas to 25 years to life for murder, plus one additional year for the firearm enhancement. In a prior opinion in Nieblas's direct appeal (*People v. Nieblas* (Dec. 31, 2013, B243851) [nonpub. opn.] (*Nieblas*)), we described the facts of the case:

¹ Subsequent statutory references are to the Penal Code.

“Padilla and Freddy Juarez are members of the Indiana Dukes criminal street gang. The prosecution’s theory at trial was that Padilla and Juarez, acting on behalf of the Indiana Dukes, extorted money from two employees of a smog check shop as payment for the gang’s having killed the owner of the shop at the request of Nieblas, also known as ‘Juero’ or ‘Guero.’ Nieblas is not a member of the Indiana Dukes, but his cousin, Stella Villa, is a member of the gang and is married to Padilla.

“Luis Hernandez was the true owner of the Nayarit Smog Shop, but Hernandez had placed formal ownership of the shop in the name of Nieblas, one of the shop’s employees. According to Hernandez’s girlfriend, Hernandez put the shop in Nieblas’s name so that Hernandez ‘could keep money away from his estranged kids.’ The prosecution introduced evidence tending to show that Nieblas was dissatisfied with the pay he was receiving from Hernandez and that he sought to have members of the Indiana Dukes street gang kill Hernandez, presumably so that he (Nieblas) would then own the shop.

“Hernandez was shot to death on July 4, 2009. After Hernandez’s death, Padilla and various associates began stopping by the shop almost daily to speak with Nieblas. The girlfriend of an employee of the smog shop testified that Nieblas referred to Padilla and the other visitors as Nieblas’s ‘cousins.’

“On July 31, 2009, Padilla and Juarez arrived at the shop accompanied by two women. Padilla told two of the shop’s employees, Walter Ernesto Salguero and Michael Salazar, to come into the shop’s office. When all four men were inside the office, Padilla told Salguero and Salazar that they had to pay him \$500 that day and \$500 per week thereafter. Salguero and

Salazar recognized Padilla and Juarez as gang members and feared for their safety if they did not pay.

“After Padilla and Juarez left, Nieblas spoke with Salazar near the bay door of the shop. Nieblas was acting ‘nervous’ and ‘paranoid’ and was ‘looking around making sure no one was around’ him and Salazar. Nieblas said he had ‘a big secret’ and told Salazar that Nieblas’s ‘cousins’ had killed Hernandez and that ‘he [i.e., Nieblas] sent them’ to do it.” (*Nieblas, supra*, B243851, at pp. 2–3.)

In 2018, the Legislature enacted Senate Bill No. 1437 (2017–2018 Reg. Sess.) (Senate Bill No. 1437), which abolished the natural and probable consequences doctrine in cases of murder, and limited the application of the felony murder doctrine. (*People v. Verdugo* (2020) 44 Cal.App.5th 320, 323, review granted Mar. 18, 2020, S260493 (*Verdugo*).) The legislation also enacted section 1170.95, which established a procedure for vacating murder convictions for defendants who could no longer be convicted of murder because of the changes in the law and resentencing those who were so convicted. (Stats. 2018, ch. 1015, § 4, pp. 6675–6677.)

Nieblas filed a petition for resentencing on January 18, 2019. The trial court appointed counsel to represent Nieblas, obtained briefing from both sides, and denied the petition on the ground that Nieblas had failed to make a prima facie case that he was entitled to relief.

DISCUSSION

A. *Background on Section 1170.95*

Section 1170.95 allows a defendant serving a sentence for murder who could no longer be convicted of murder because of changes in the law enacted in Senate Bill No. 1437 to petition for resentencing. To obtain relief, a defendant must file a declaration affirming that he is eligible for resentencing under the new law. (See § 1170.95, subd. (b)(1).) The trial court considers the petition according to a three-step process. First, the court “review[s] the petition and determine[s] if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section.” (§ 1170.95, subd. (c).) This is “a preliminary review of statutory eligibility for resentencing,” akin to an initial review of a petition for resentencing under Propositions 36 and 47. (*Verdugo, supra*, 44 Cal.App.5th at p. 329, review granted Mar. 18, 2020, S260493.) “The court’s role at this stage is simply to decide whether the petitioner is ineligible for relief as a matter of law, making all factual inferences in favor of the petitioner.” (*Ibid.*) In making this decision, the trial court may consider the record of conviction, including any prior appellate opinions in the case. (*People v. Lewis* (2020) 43 Cal.App.5th 1128, 1137–1138, review granted Mar. 18, 2020, S260598; *Verdugo, supra*, at pp. 329–330.)

If the petition survives this first stage of review, the court must appoint counsel if the petitioner has so requested. (§ 1170.95, subd. (c).) The prosecutor then files a response, and the petitioner may file a reply. The review at this stage “is equivalent to the familiar decision[-]making process before issuance of an order to show cause in habeas corpus proceedings, which typically follows an informal response to the habeas corpus

petition by the Attorney General and a reply to the informal response by the petitioner.” (*Verdugo, supra*, 44 Cal.App.5th at p. 328, review granted Mar. 18, 2020, S260493.) Under this standard, “[i]f the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.” (§ 1170.95, subd. (c).)

If the court issues an order to show cause, it must hold a hearing within 60 days to determine whether to vacate the murder conviction. (§ 1170.95, subd. (d)(1).) At this third and final stage of the proceeding, the prosecution has the burden of proving “beyond a reasonable doubt[] that the petitioner is ineligible for resentencing.” (§ 1170.95, subd. (d)(3).)

B. *Nieblas Is Ineligible for Resentencing as a Matter of Law*

In this case, the trial court denied the petition at the second stage of prima facie review. At this stage, the trial court “ ‘takes petitioner’s factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue an order to show cause.’ [Citation.]” (*Verdugo, supra*, 44 Cal.App.5th at p. 328, review granted Mar. 18, 2020, S260493.) In making this determination, the trial court may reject the defendant’s claims if they are refuted as a matter of law in the record. (*People v. Drayton* (2020) 47 Cal.App.5th 965, 980; *People v. Soto* (2020) 51 Cal.App.5th 1043, 1054–1055 (*Soto*).)

The trial court denied Nieblas’s petition on the ground that his “conviction for murder was not based on either felony murder or natural and probable consequences theory.” Nieblas contends that this was error because the record is ambiguous as

to the nature of his conviction. According to Nieblas, the trial court therefore could not reject his claim that he was entitled to relief. We disagree. The jury instructions are part of the record of conviction, and they may establish whether a petitioner has made a prima facie case. (*Soto, supra*, 51 Cal.App.5th at p. 1055.) In this case, the jury received no instruction on the natural and probable consequences doctrine or felony murder. Thus, “under the instructions, the jury necessarily found [Nieblas] culpable for murder based on his own actions and mental state.” (*Ibid.*) The jury must have found that Nieblas acted with the intent to kill Hernandez. As a matter of law, Nieblas could still be convicted of murder under the law as amended by Senate Bill No. 1437, and the trial court did not err by denying his petition.

DISPOSITION

The trial court’s order is affirmed.

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ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, J.